UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 05-44481
- -x
In the Matter of:

DELPHI CORPORATION,

Debtor.

- -x

U.S. Bankruptcy Court
One Bowling Green
New York, New York

August 17, 2006
10:05 a.m.

B E F O R E:
HON. ROBERT D. DRAIN
U.S. BANKRUPTCY JUDGE

MOTION For Relief From Stay The Offshore Group's Motion Pursuant To Bankruptcy Code Sections 362(D)(1) And 553 For Order Lifting The Automatic Stay To Permit The Offshore Group

To Exercise Right Of Setoff

EX PARTE Motion To File Under Seal Exhibits To The Official Committee Of Unsecured Creditors' Motion For An Order Authorizing It To Prosecute The Debtors' Claims And Defenses Against General Motors Corporation And Certain Former Officers Of The Debtors

APPLICATION To Employ Fee Committee's Application For An Order Authorizing Retention Of Legal Cost Control As Fee And Expense Analyst, Nunc Pro Tunc To June 1, 2006, Pursuant To Sections 327(A) And 328 Of The Bankruptcy Code

MOTION To Authorize Motion For Order Under 11 U.S.C. Section 365 And Fed. R. Bankr. P. 6006 Authorizing (I) Rejection Of Remaining Executory Contracts Of MobileAria, Inc. And (II) Assumption And Assignment Of Executory Contract With DPAC Technologies Corp.

MOTION To Approve Motion For Approval Of Joint Interest Agreement Between Debtors And Official Committee Of Equity Security Holders And Implementation Of Protective Order With Respect Thereto

MOTION To Approve / Motion Pursuant To Sections 105, 328(A) And 1103 Of The Bankruptcy Code And Bankruptcy Rule 2014 For Order Granting The Official Committee Of Equity Security Holders

Leave To File An Application To Retain And Employ A Financial Advisor

AMENDED Motion For Relief From Stay Filed By Douglas M. Tisdale On Behalf Of Nutech Plastics Engineering, Inc

MOTION For Reclamation Of Claim (For Order Directing Return Of Reclaimed Equipment Or For Immediate Payment Thereof)

Transcribed By: Esther Accardi

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P R O C E E D I N G S

THE COURT: Please be seated. Okay. Delphi.

MR. BUTLER: Your Honor, good morning. Jack Butler and Kayalyn Marafioti and Tom Matz here on behalf of Delphi Corporation for its August omnibus hearing. We have filed, Your Honor, the proposed tenth omnibus hearing agenda and we'll follow that order if that's acceptable to the Court.

THE COURT: Okay. Yeah, that's fine.

MR. BUTLER: Your Honor, the first matter on the agenda matter number 1 is the Offshore Groups lift stay motion, filed at docket number 28111. That's being handled by the Togut firm. Mr. Berger's here to report to the Court.

THE COURT: Okay.

MR. BERGER: Good morning, Judge. Neil Berger, Togut Segal & Segal for the debtors. Your Honor, this matter has been settled it's between Delphi and Offshore so that Offshore's setoff amount has been substantially reduced under paragraph 18 of the final dip order in the case. The unsecured creditors' committee has an opportunity to review that proposed settlement. We hope in the next few days to have the back up package of the settlement sent to the committees' professionals and our goal is to have a stipulation submitted before the September omnibus hearing. So for purposes of the agenda we ask that it be adjourned.

THE COURT: Okay. That's fine.

MR. BERGER: Thank you, Judge.

MR. BUTLER: Your Honor, the next matter on the agenda, agenda matter number 2 is the creditors' committee GM claims and defense's motion, at docket number 4718. The agenda indicates that by agreement of the parties that this matter is being adjourned to the September 14th hearing. In fact, the parties agreed last evening, with Your Honor's permission, to adjourn the STN motion to the October 19th omnibus hearing.

THE COURT: Okay. That may just resolve all the issues. I know that there were some correspondence about GM's access to redact a portion of the motion. Is that making fire or has that been resolved at this point?

MR. BUTLER: It's hanging fire at the moment. And the debtors haven't agreed. The only matters that have been redacted, Your Honor, are the issues that were privileged that were based on information the creditors' committee got under the joint interest agreement.

THE COURT: Okay.

MR. BUTLER: And our position, if it ever becomes an issue, I think has now been put off for a while. If it ever becomes an issue the debtor's position will be that that privileged information should not be made available for purposes of the STN hearing.

THE COURT: Okay. Well, that's fine. If it looks like that's actually going to be litigated in October don't

forget that issue because -- I'm sure you wont. It will need to get resolved before then, I'm assuming. It didn't seem to be a clear cut issue to me. Particularly given the fact of other privilege and secondly of the fact that perhaps some of this information came from investigation. So perhaps the

government might be involved too. So, anyway, I just wanted to see what the status of that was.

MR. BUTLER: Well, Your Honor, with the Court's permission, our intention would be not to submit a response of the chamber's letter unless this really becomes an issue.

THE COURT: Right. That's fine. I'm not inviting you to. I just want to make sure no one forgets about it if it becomes a live litigation.

MR. BUTLER: Thank you, Your Honor. Your Honor, matter number 3 on the agenda is the fee committee's legal cost control application retention, this was filed at docket number 4117. Of importance, I would point out to the Court that there was a supplement filed by the fee committee at docket number 4896, that clarifies the role of legal cost control really is a fee and expense analyst reporting to the fee committee and carrying out the fee committee's instructions to help the fee committee, as Your Honor had said at prior hearings, manage the information that the fee committee's is going to take responsibility for carrying out its mission. And I think -- and as you can tell by the lack of objection from any party, I

think there has been some consensus reached by the parties in interest and they retained professionals on that subject.

THE COURT: Okay. And the fee that they're charging hasn't changed. So everyone's had notice of that and no one's objected to that?

MR. BUTLER: That's correct, Your Honor.

THE COURT: Okay. All right. In light of that, in my review of the supplement, I'll approve it.

MR. BUTLER: Thank you, Your Honor. Your Honor, matter number 4 on the agenda is the MobileAria contract

motion. It's filed at docket number 4721. This simply is a motion to assume three additional contracts. An agreement for software development dated April 20, 2005 involving DPAC Technologies Corp. Second, a computer consulting and programming services agreement involving Mascon IT Ltd. Dated September 10, 2004 and finally a consulting agreement between North America Mobile Solutions LLC and the debtors, dated September 1, 2005. No objection has been filed. Each of the counter parties has consented to the assumption. Each party has also agreed to the proposed cure amounts as is set forth in the form of proposed order, Your Honor.

THE COURT: All right. In light of those agreements and there being no objections by anyone else, I'll approve it.

MR. BUTLER: Thank you, Your Honor. Your Honor, matter number 5 on the agenda is the equity committee joint

interest agreement motion. This is really, Your Honor, a motion that has come out of not only discussions between the equity committee and the debtors but guidance Your Honor gave in chambers conference to determine if there was an opportunity to provide, without compromising issues for the debtors, to provide the maximum amount of visibility for the equity committee in the General Motor's matters. And unlike the joint interest agreement motion that was entered into with the creditors' committee which dealt with a broad range of investigative matters, this particular joint interest agreement is related to General Motor's matters and limited to that. Otherwise, it follows the form and is based on the law and the argument we had at the prior hearing on the creditors' committee joint interest agreement motion. No objection has been filed by any party to this. The debtors are prepared to

move forward promptly, perhaps as soon as tomorrow, in beginning to provide additional information that would be covered by this agreement after it's approved by Your Honor to the equity committee. And one additional point I'd make, Your Honor, is one of the pieces of information provided, and just so we're not in conflict with one of the prior ceiling orders, Your Honor, is we would also then provide them, again, privilege issue having been addressed through the joint interest order, we would provide them, and the creditors' committee has agreed to this as well, with an unrecacted copy

of the proposed complaint.

THE COURT: Okay. All right. Again, in light of this being uncontested and there being adequate notice, I'll approve it.

MR. BUTLER: Thank you, Your Honor. Your Honor, matter number 6 on the agenda is the equity committees' financial advisor retention motion, at docket number 4791. This is not, as Your Honor probably notes, a specifically a request for retention of any particular financial advisor. Because that action would have been prescribed by the order appointing the equity committee. But rather is a result of extended discussions between the debtors, the equity committee and there's been some input from the creditors' committee as well. I believe the United States Trustee has been consulted on this issue as well. And based on the scope of services and the fee structure that is described here, the criteria, it is the view of the parties that it would be appropriate, if Your Honor's inclined to do it, to essentially amend the prior order or at least to exercise the Court's discretion as provided in there and grant leave for the equity committee to file

retention application for a financial advisor that meets these criteria. And there is no objection that has been filed to that proposed motion.

THE COURT: All right. And it says, 175 thousand. Obviously, if you can get them to work for less, you'll do

that?

MS. STEINGART: Yes, Your Honor. We certainly will.

THE COURT: Okay. All right. Well, obviously there's been a lot of discussion about this among the parties in interest and I view this as, basically, everyone's view. That at this point in the case, subject to obviously seeing the application, that it would actually be beneficial to have an additional professional for the equity committee under these limitations. So I'll approve it.

MR. BUTLER: Thank you, Your Honor. Your Honor, matter number 7 on the agenda, it's listed under the contested matters, is the Nutech Plastics Engineering lift stay motion, filed at docket number 4436. I think the Court's aware there were a flurry of chamber's letters and competing orders that hit chambers this week. We were successful in engaging Nutech's counsel in a meeting confer last evening and being able to resolve all of that. And we've submitted a proposed order to the Court that we believe faithfully deals with, and Nutech now agrees, deals with what Your Honor said at the prior hearing, which gives them the ability to make clear that the 360 doesn't apply to General Motor's Corporation. That makes it clear unless Your Honor, otherwise rules to the contrary, this Court would determine the Nutech issue at some point in the future. The merits of that provides that Mr. Mailey would be able to be deposed and the stay would be modified to that

extent. And then would otherwise continue this matter to the September 14th hearing, as to any matters Your Honor did not resolve earlier. There is a difference of view between the parties as to what Your Honor actually said at the July hearing. I'm hopeful that dispute can be resolved through negotiations between now and September. And if not, the parties reserve their rights to reflect on what the Court and what the July record said.

THE COURT: Okay. I already signed off on that order, I saw it this morning. As far as the hearing on the 14th, given that the issue with Mr. Mailey has been resolved it seems to me that the only remaining issue is that, if for some reason the Michigan Court doesn't accept this approach, in which case I've given them the opportunity to come back and tell me more about it. So I'll see you all then unless you're able to resolve that in the meantime.

MR. BUTLER: Thank you, Your Honor. Your Honor, that leaves us with one final matter for this morning's hearing. And that is the Speedline Technologies Inc.'s reclamation motion, filed at docket number 4678. Both the debtors and the creditors' committees have filed objections. The debtor's at 4893, the committee at 4887. And Mr. Vasser is here to argue on behalf of Speedline in support of the relief they're requesting.

THE COURT: Okay.

MR. VASSER: Good morning, Your Honor. Shmuel

Vasser, Edwards Angell Palmer & Dodge, for Speedline Technology Inc., the movant. Motion was filed and served on the master service list. Two objections, creditors' committee and debtors. Also under the case management order on Monday I sent an email to the parties asking them if they intend to produce any evidence of testimony other than what's their objection. The answer was no. resulting in the joint exhibit. I limit myself to responding to the objection. I assume the issues as far as the movants are concerned in the moving papers are fairly straight forward. The first issue is the only disputed issue as to whether we met the initial elements proclamation is insolvency. The debtor did not dispute our assertion of insolvency. Neither did the committee. No one in the committee says they were solvent. The committee says we didn't approve it. Like any other litigated matter I'm not disputing, we have the burden of proof, which means the burden of persuasion. Which means we have the burden of moving forward. We move forward. We rely on the 10K filed for the end of '05 showing insolvency to the extent of six billion dollars certified under Solvents Oxley certification requirement. Relied on the schedules filed in this bankruptcy court on the plenty of perjury showing solvency to the extent of about fifteen billion dollars. Cases have held that schedules when uncontroverted as sufficient evidence. These cases are

Sullivan at 161 BR 776 and Nicole at 36 BR 566. Both I would note in a fraudulent transfer cases where you need to prove obviously solvency of insolvency. Schedules and GAP financials as the committee cases itself, concede are sufficient of probative evidence which of course can be adjusted. I haven't seen any proposed adjustment that would eliminate between six

and five billion dollars in stock holder equity or lack of equity based on the evidence. So based on the record as it stands, there is no evidence, whatsoever, even attempting to disprove our initial evidence that be sufficient, I submit, as far as meeting the burden of moving forward. I would also note an interesting case, Continental Airline out of Delaware 125 BR 415, where the debtor in response to another pleading admitted insolvency. But in response to the reclamation motion denied that it was insolvent. The Court said that that admission by the debtor in another unrelated proceeding within the case is sufficient and seems there was nothing to buttress the debtor's assertion in response to the reclamation that it was not insolvent. The movant met its burden of moving forward.

THE COURT: That was based on judicial estoppel principals?

MR. VASSER: Yes.

THE COURT: So that wouldn't -- has the debtor won anything in this case asserting insolvency?

MR. VASSER: The debtor filed schedules --

THE COURT: No, no. Judicial estoppel only applies if the party against whom estoppel is asserted has prevailed on a contrary opinion.

MR. VASSER: I just note that Continental is an interesting side to this issue.

THE COURT: Okay.

MR. VASSER: Now, the second issue, assuming I made the burden of moving forward and that wasn't controverted, the second issue is the impact of secured creditors. I submit that under the facts of this particular motion, we should not really address the conflicting case law and the conflicting statement

relied upon by the committee on one end and interestingly the debtor and Speedline on the other. We're relying on that. The reason is because the reliance on secured creditors position to block, in one way or another, is the claiming seller's rights is irrelevant here for three reasons. The pre-petition agent and the post-petition agent did not object to this motion. They didn't come here and say it's our collateral we are objecting to this release. Had they done that they would still be estopped by doing that by the reclamation order. The final reclamation order specifically allowed the debtors to either provide -- return the equity essentially allowing it for pick up, and I would note that that is the final order is docket 881 of paragraph 2(b)(d)(i) says that the debtors, may at any time, make the goods available for pick up. And at (ii) of that

particular paragraph, the debtor may satisfy the claim at any time before or on confirmation. The agents did not oppose that. Had they opposed that, they'd still be barred because the DIP facility, the draft of which is the only one I've seen in docket 42, I haven't seen the executed documents, doesn't prohibit that. There's a payment or return of the equipment is not breach of any covenant under the DIP facility. Nor will it cause a breach under the DIP facility. The reason is obvious, the debtor is operating in the ordinary course of business. The debtor is paying ordinary expenses every day. The debtor is paying professionals. The debtor pays bonuses for executives. In the ordinary course of business payments are not prohibited by the DIP facility. So very interesting legal argument about the committee's position and whether we should wait until confirmation because they don't know the scope of our reclamation claim, not the principal here.

THE COURT: I don't understand that. These are pre-petition obligations, right?

MR. VASSER: They're pre-petition obligation debt. Are entitled to reclamation under the UCC. And the bankruptcy code says the only way -- the only relief available if you deny the reclamation claim is an adment.

THE COURT: Right. But how does that translate into an ordinary course post-petition course of business payment.

MR. VASSER: Payment was due post-petition because

the agreement was delivered just a few days before the petition. So under the ordinary course of business between the parties, the payment for the invoices was due post-petition. But I'm not saying that it was delivered post-petition. All I'm saying its an administrative expense, we have reclamation right, the reclamation right is not barred by the secured creditors under the facts of this case. And therefore, I think I established our rights to reclaim the goods and that right is not diminished, it's not blocked, it's not prohibited by the secured creditors. Okay. I get to how I want to get paid in a second. I can go through why I disagree also with the legal position, I'll do it briefly because I think the fact that the secured creditors are not objecting and agreed to the final reclamation order is really the dispositive issue here.

THE COURT: So what about the case law that says that where the secured debt exceeds the value of the particular goods sought to be reclaimed, to pay the reclaiming creditor what be a preference to the detriment of the unsecured creditors.

MR. VASSER: Let me finish just the thought and I'll get to that. There's actually cases supporting what I'm saying

here at the secured creditor's lack of objection result in the right to reclaim the goods not subject to. And the main case on that is Georgetown Steel, it's reported at 318 BR 340 at 348, it's a bankruptcy from the District of South Carolina

where it says in the case presently before the Court, the secured creditor have been paid in full, or and I emphasize, or otherwise appeal to have released their claim to the reclamation creditors' goods through the lack of objection, or replied consent, to the relief sought by the reclaiming creditor. That's exactly the situation there where the secured creditor did not object to the reclamation motion. Now the case law you refer to and the committee sides. First, none of the cases are relevant here. This is a unique case. I haven't actually haven't seen the facts of this case in the reclamation cases because everything that they side to, and actually everything that exists out there is inventory, goods that the debtors are either purchase and sale and then commingle the proceeds or goods that they're using the manufacturing process. I haven't seen one case where it's one piece of manufacturing equipment that the debtors actually use, again not disputed. But today, in manufacturing the goods that bring post-petition value to the estate. Now if you look at all of these cases, except for Primary Health, which is a very short decision, can't really figure out the exact fact. But in Pittsburgh-Canfield, in Victory Markets, in ARCO, in Bailey Marks, the goods were sold, the were commingled or the reclaiming seller was not able to prove that the debtor had possession of the goods at the time of the petition filed. All of these cases have nothing to do with the facts of this case. Point one.

Point two, every case that they cite, including Pittsburgh-Canfield, which is the main case they relied on Victory Markets and ARCO essentially conclude -- yeah they made the statement that they're taking by saying you know, you don't have reclamation right if the -- your claim is smaller than the secured creditor's claim. However, the way they actually conclude, and I quote from Pittsburgh-Canfield is as follows. "We chose to follow the well reason cases which hold that the reclaiming seller is entitled to an administrative claim in any surplus proceeds remaining after the protective secured creditor interest has been satisfied or released." The debtors briefed it. I mean I find this position a little bit strange and I'll tell you why in a second. But that's why in my motion it was really short and sweet. But the debtor's brief is more fully and that is all of the cases. That's what ARCO said, that's what Victory Market says, that's what White & Sommers, by the way, the leading scholars on the UCC say about reclaiming creditor's claims versus secured creditors. Now the reason I was taken by surprise by this argument is as follows. Delphi had two and half billion dollar in outstanding secured debt on the day they filed. Any seller sold twenty half billion dollar of goods in the ten days before the filing. We are ten months after the filing. The reclamation order was entered a few weeks after the filing. The creditors' committee constituted. Nobody came to you and say Judge, why are we

wasting the time and money, professionals in Pfizer reviewing 855 reclamation claims. Doing reports and exchanging and arguing. They're all done. They're all done. I mean, can the

debtor tell us if there's any reclamation claim that was filed for over two and a half billion dollars. It's just bizarre. So the whole argument -- if the committee really believed in this argument should have come here maybe after there was deadline to file reclamation claims, it was months ago, and say guys, stop. We'll go to the judge and we'll tell to the judge in omnibus motion no reclamations in this case.

THE COURT: But that doesn't mean that you're entitled to get paid now.

MR. VASSER: Okay. That's the last point I was going to get to. My entitlement to be paid now. Here, I'm going back to Continental Airlines. The debtor is saying that we have been shown prejudice. They kind of get it backwards.

THE COURT: No. As a legal matter you're not entitled to be paid now.

MR. VASSER: I understand.

THE COURT: Because the secured debt has neither been satisfied nor released.

MR. VASSER: The --

THE COURT: You may have established your right, if in fact, it's eventually satisfied or released to have surplus. And that's why the deadline was set and the review process was

set because there's a lot of hurdles one has to get over before even having that right. But that doesn't mean you'd be paid now.

MR. VASSER: The reason where a debt goes back to the argument that Your Honor can accept or reject. Obviously, you're the judge. Based on Pittsburgh Steel and based on what I believe is the correct interpretation of the facts in this case, the secured creditors did not object. I don't think its

okay for all other administrative expense claims to be paid and put a reclamation creditor, whose claim the secured creditors did not object, wait in line when the potential prejudice, by the way, is huge. Again, nobody disputed that right now there's about 1.8 billion dollars in access collateral based on the numbers that the debtors filed with this case. The debtors can wipe this out, this cushion, immediately when they need by going these funds. Now, I'm not objecting to the borrowing. I think that if they figure out that I'm estopped from objecting to the DIP financing, I'm not. Let them borrow as much as they like. All I'm saying that the factors we have now, I have reclamation rights. The secured creditors are not concerned by me taking the equipment back as they indicated by the lack of response to the motion and no objection to the reclamation order that allowed the debtors to return equipment. So I'm standing now with my right to get the equipment back. If I get the equipment back, I'm being paid now. Essentially, I get the

value now. If I get an administrative expense claim that's not being paid now I have to wait a year, two, three, eventually may get nothing. Because while I have value now, there may not be value in the end. Now, what the Court in Continental Airlines said when --

THE COURT: Well, if there's no value at the end there's no value for the secured creditors' either, or they're undersecured. So you wouldn't have a right at the end.

MR. VASSER: But right now the secured creditors are okay with their collateral. They are not concerned as evidenced by lack of their objection by the reclaiming seller taking this piece of equipment back. They are fine with their collateral package. So what the Court in Continental Airlines

said, now that the reclaiming seller proved its right for reclamation there's a balancing test. And the balancing test is between the legal rights of the seller to gets its equipment. Actually, the Continental Airline case said that prejudice to the reclaiming seller is almost irrelevant in this balancing analysis. However, the Court needs to look at the debtor's need in light of the Chapter 11 reorganization course. Indicating and referring to testimony, to evidence provided to the bankruptcy court in Continental Airline, that the equipment was absolutely necessary, that they didn't have replacement equipment that was necessary to do the job and it was impossible for them, under the facts of that particular case,

to obtain suitable replacement equipment, the Court said the balance here justifies leaving the debtor to retain the equipment. Here, there's no evidence. The debtor didn't say that they needed it. They didn't say they can't replace it. There's nothing on the record of that. So if you do the balancing analysis based on reclaiming seller legal rights to get the equipment back versus no showing by the debtors of why they need to retain this equipment, then the result in my mind is fairly simple, we get the equipment back. If they don't want to give us the equipment back, okay. I'm willing to take an administrative expense claim, but not a prejudicial one. They can either give us the equipment or they can pay us.

THE COURT: Let me go back to your waiver argument. This is a pre BAP CPA case. As the code was then written and as applicable here, it says that the rights and powers of a trustee, you know the debtor in possession, are subject to any statutory or common law right of a seller of goods that has sold goods to the debtor in the ordinary course of such

seller's business, to reclaim the goods. Which puts the onus in my mind, objectively, on the right given the non-bankruptcy law of the reclaiming seller. That was changed in 2005 to say that subject to the prior rights of a holder of a security interest in such goods, which seems to put more of the onus perhaps on a secured creditor to protect its own rights, it does not provide more fodder for the argument that you can't

really point to a waiver here since it's at least a version that's currently -- that's in effect for this case. It doesn't look to the secured creditor and perhaps the secured creditor's enforcement of its rights, but rather just generally abstractically to the rights of a reclaiming seller.

MR. VASSER: Maybe. But I think the issue here is slightly different. And I recognize, you know, why everybody may be struggling with this argument. But the point is really that simple. When you go to Court and you ask for relief, people who have interest adverse to you need to object.

THE COURT: But the question is is it just those people, is it just the bank or is it all the other unsecured creditors who under the constrict of the UCC would be pari passu with your client.

MR. VASSER: Well, most of the cases that they cited in objection to my position was forget bankruptcy you get what you get outside of bankruptcy. Outside of bankruptcy there's no questions that the UCC provision dealing with the priority between secured creditor and the claiming creditor was designed to resolve the dispute between these two parties. They have nothing to do with the unsecured creditors. It's like saying that junior lien note when it forecloses and the secured liener doesn't object and doesn't come to court and sit on his right

and doesn't do anything the junior lien note now is pro rata with the unsecured creditors. I mean, if there's a legal

theory to that extent I have never heard of it. So I understand it in the context of a bankruptcy everybody wants to get paid more, that's why we're here, I realize that. I realize that the debtor doesn't want the motion to be granted, not because of 189 thousand dollars but because they have 855 reclamation claims to deal with. The solution in the next case is very easy, the reclamation order should be, maybe if the you or your brethren will sign it and approve of it, maybe the reclamation claim should carve out DIP financing. Maybe the DIP financing if it's authorized after the reclamation is entered need to be dealt with it. Maybe evidence need to be presented before the Court as how important the equipment is. But right now we, the secured creditors essentially did not object for us taking the equipment back. The debtor wants to keep it, the debtor needs to pay for it.

THE COURT: Okay.

MR. VASSER: Thank you.

MR. BUTLER: Your Honor, in part what we're arguing about is the application of what is now a final order in this case which is the amended final reclamation order. Mr. Vasser is proceeding under paragraph 10 of that order which says nothing herein shall preclude the holder and allow reclamation claim from seeking payment of such claim in a manner that is set forth -- in a manner other than is set forth in this order. And while technically Mr. Vasser's client doesn't have an

allowed reclamation claim because they filed a disagreement to the statement of reclamation back in April, the debtors aren't relying on that technical argument. But I would just point out to the Court that paragraph 10, which is what Mr. Vasser's citing to, would have required him to agree to the statement of reclamation as opposed to disagreeing so that there's not an allowed reclamation claim here. The other aspect of the order I want to bring to the Court's attention, is the operation of paragraph 3 of the order. Which says that nothing in this order permits the debtors, prior to the return -- or would allow the debtors to return goods in respect to reclamation claims or to an accept an agreement to the allowance of payment of a reclamation claim without going through a procedure with the creditors' committee. And that procedure with the creditors' committee is really the heart of the issue here. The answer to Mr. Vasser's question as to why we went through these procedures and why you try to move this process forward is in every major Chapter 11 where there are reclamation creditors of any size or number. And originally the reclamation claims in this case were over 300 million dollars. And they're now been reconciled to something less than twenty-one million dollars. And you go through a process to try to scope out what the real issue is in terms of the amount of reclamation claims because there are a series of competing interest. The secured creditors don't want their collateral

eaten into. The creditors' committee has an inherent bias against having a creditors -- some creditors prefer over others. And they don't want these reclamation claims allowed or paid or rather having share pari passu in the creditors'

committee general unsecured creditor recovery. And the law here, as both included in the debtor's brief and in the creditors' committee brief, if pushed to the envelope in terms of actually forcing Your Honor to make a decision on that issue and from the debtor's perspective can come out potentially wrong for the debtor's estate. That is to say the debtors have an interest in maintaining relationships with its suppliers and trying to move the reclamation issue forward and ultimately resolve it under a plan. And, in fact, most reclamation payments as a practical matter in larger cases are resolved in connection with a plan. Because as Your Honor pointed out, and as our papers point out, it's then when you understand whether or not there are any issues with secured credit or recovery. And its then that you're able to resolve in the context of framework of a plan all of the issues with unsecured creditors. And unsecured creditors are generally are willing to then waive some of the arguments that I think are complicated under the case law. And just as I've urged my colleagues who represent the creditors' committee from not pressing their legal arguments to the applicable limits today, I think the right answer here is really the position we're trying to strike in

our brief. Which is this request under paragraph 10, putting aside that it's not an allowed reclamation claim and assuming that it would be for purposes of applying the order, it's just simply premature to do that. There's nothing in the case law, there's nothing in the facts of this case, there's nothing in any of the evidence that Mr. Vasser's clients presented here, that would suggest that even under any balancing of harms or any other balancing that there's any particular reason to pay an out of the ordinary course administrative claim, which is

what this would be if it were allowed. This is an administrative claim. Even if it were allowed it's subject to a series of reserved offenses. In paragraph 3(d) one of the issues in the reclamation reports between the creditors' committee and the company was the analysis and the give and take, if you will, between the creditors' committee and the debtors regarding the legal analysis of and position with respect to any legal issues that relate specifically to one or more reclamation claims as well as general legal issues. And that focused on, the dispute the creditors' committee had from the beginning of this case, if one goes back to the time that this order was entered, about whether reclamation claims could ultimately be allowed. And I would just report to the Court that the process in paragraph 3 has not yet been completed. That is to say, that while we have shared the reclamation reports and we have provided information regarding a 100

percent of the demands and our reconciled amounts of the creditors' committee, the creditors' committee has still raised this issue of reserved defenses of liens back in February of this year. And they have also asserted that our reports aren't complete until we resolve that issue with them. In their objection when they note that they haven't received a complete reclamation report that reference is really to this reserved issue between the parties. And I just, you know, from our perspective, Your Honor, I'm going to rely on the arguments that are in our paper. I don't think we need to go through all the case law unless Your Honor has questions about it. But I will tell you from the debtor's perspective the right answer here is not to grant the creditors' committee objection that there are no reclamation claims to be permitted in this Court.

Nor is it to grant the relief requested by Speedline that they receive an immediate payment of a claim which has not even completed the process that's outlined in the final reclamation order. Because under paragraph 3 we're not empowered to take that payment until we have completed this process with the creditors' committee. But the right answer is to deny this motion without prejudice to Speedline bringing in the future if they feel the facts and circumstances have changed that would warrant them coming before the Court to seek payment. And I believe, Your Honor, at the end of the day this matter will all be right resolved as part of the reorganization plan. When

hopefully, when our plans, in fact, become reality, we will succeed in repaying all of the secured creditors, and we will be able to address reclamation claims in a meaningful way. But the process itself, I think and I don't -- the other point I'd make, is I don't think we ought to dismiss the importance of maintaining supplier relationships by having gone through a process and having, in a meaningful and thoughtful way, addressed and resolved substantially all the claims. I said we're down from, you know, over 300 million to under 21 million. And then final pool of claims ultimately, I believe, will end up being paid in connection with the plan of reorganization. But that is then and this is now and at the moment, Your Honor, we would ask that you deny this motion without prejudice.

THE COURT: Okay.

MR. SEIDER: Good morning, Your Honor. Mitchell Seider of Latham & Watkins on behalf of the official committee of unsecured creditors. Your Honor, we have briefed the issues that were raised in Speedline's motion and we're happy to rest

on our papers. I know from experience that Your Honor has probably read them.

THE COURT: Okay.

MR. SEIDER: There was one argument that was raised by Speedline's counsel that I'd like to address very briefly. The argument was that this case should not be subject to extent

case law because the goods at issue here are equipment rather than inventory. We don't see any basis in the UCC Warrant Section 546(c) for distinguishing equipment from inventory for the purpose of apply the extent case law. With respect to Mr. Butler's comments Your Honor and the Court's disposition of today's motion I would point out that in the prayer that was contained at the end of our objection we did not ask for a declaratory judgment with respect to the validity of reclamation claims in this case in general. We only asked that the motion of Speedline be denied. That is, in fact, what we think is appropriate based upon the arguments that have been made by counsel for Speedline and the authorities that have been cited to Your Honor by the committee in its objection.

THE COURT: Okay.

MR. SEIDER: Thank you, Your Honor.

THE COURT: All right. I have in front me a motion by Speedline which has filed a reclamation demand and asserts a reclamation claim in these cases for, or related to its provision of a specific piece of property to the debtors on credit. It's objected to on essentially a similar grounds on by both the debtors and the official unsecured creditors' committee. The objections raise one common issue and two other issues and I conclude that based on my view of the common issue I do not need to get to the other issues. The other issues

being whether in fact Speedline has satisfied the hurdles

specifically set forth in Section 546(c) of the bankruptcy code. Including establishing that its debtor was insolvent at the relevant time. That determination, as well as determination in any of the other reserved defenses, needn't be made at this time. Given my view that because the debt that is secured by the asset that serves as the basis for Speedline's reclamation claim is in excess of that claim and has neither been satisfied nor released. At this time Speedline is not entitled to the rights that it would have under the Court's order establishing procedures for the treatment of reclamation claims dated November 4, 2005. Which provides among other things for the allowance of an administrative claim for an allowed reclamation claim and payment of such claim in the sole discretion of the debtors or pursuant to a confirmed plan of reorganization. In either case only if and to the extent that such allowed reclamation claim constituted administrative expenses under applicable law as set forth in paragraph 2(d)(ii) of that order. The statute governing this issue is Section 546(c) of the bankruptcy code as I mentioned a minute ago as an effect before the effective date of the 2005 BAP CPA amendments to the bankruptcy code. And its well settled that under that section a reclaiming creditor does not have an independent right of reclamation but that that section only preserves any right the seller may have outside a bankruptcy. See for example, In re Quality Stores, Inc. 289 BR 324, 333

Bankruptcy W.D. Michigan (2003), and In re Pittsburgh-Canfield

Corporation 309 BR 277, 6th Circuit BAP (2004). The parties I think are all in agreement and even if they weren't this would be the law that therefore, the Court must look to the reclamation claimant's rights under Section 27023 of the uniform commercial code. That section subjects the rights of a reclamation creditor under Section 27022 to the rights of a buyer in the ordinary course or other good faith purchaser. And case law has established that a creditor with a prior perfected floating security interest or a secured instant property generally who acted in good faith and per value is a good faith purchaser for purposes of that section. See for example In re Oralco 239 BR 261, 267 Bankruptcy SDNY (1999). Under the prevailing, and in my view, correct version of the case law including as set forth in the Oralco case, but also as discussed at length, encodently in the Pittsburgh-Canfield case. Consequently, a reclaiming creditor does not have a right of reclamation until it is established that either the secured creditor, with a prior interest in its particular asset, has released the interest in that asset or has been paid in full. I.e. that there are surplus proceeds from the asset that the reclaiming creditor seeks to reclaim. That clearly has not happened here. The case law also makes it clear that the reclaiming creditor has what is in essence an inrem right or literally an inrem right. And until it is established that

again the prior creditor has either been satisfied out of the proceeds of that particular property from which the reclaiming creditor's rights stem or has released its lien, the value of the reclaiming creditor's inrem right is zero. The Pittsburgh-Canfield case specifically dealt with the issue raised in the motion which was that the Court should look at whether the

collateral package, as a whole, held by the secured creditor would satisfy the creditor. And therefore should be directed to make a determination that the secured creditor does not need the particular asset that is the basis for the reclamation claim. And in that case properly rejected that argument. I should note that even with the change to the bankruptcy code after the applicability of BAP CPA the leading commentator in this area is of the view that the pre BAP CPA cases would still apply. And in particular, that a reclaiming seller whose right is subject to that of a secured creditor may not invoke the equitable principal of marshalling or a similar principal to require a senior secured creditor to look to assets in which the seller has no interest. See Five Collier on bankruptcy paragraph 546.042(a)(vii) and in so concluding the editors of Collier site the Oralco case at 239 BR 27477 Bankruptcy SDNY (1999). In response to that case law the reclaiming selling here contends that the provisions of Section 546(c) are intended only to protect the secured creditor and that the secured creditor here, by failing to object to the motion has

waived its rights as a secured creditor. And consequently the reclaiming creditor may take over the secured creditor. There are two problems with this argument. The first is that the case law again, I believe correctly, does not -- or at least the majority case law takes the position that Section 546(c)'s reference to otherwise applicable rights of the reclaiming creditor protects not only secured creditors but unsecured creditors from having a reclaiming seller, who under applicable non-bankruptcy law, would have a zero-valued reclamation claim from obtaining an unearned or unmerited priority. Again see the Pittsburgh-Canfield case as well as In re Primary Health

Systems Inc. 258 BR 111 at 117 Bankruptcy District of Delaware (2001) which noted that elevating such a claim to administrative status in a bankruptcy case would give the claimant a windfall. As is frequently noted by the Court's, including most recently by the Supreme Court in its decision last term in the Howard case, priorities are to be determined narrowly in bankruptcy given the fact that any priority takes money out of the pocket of those who do not have a priority. Secondly, given that case law and also given the process laid out in the Court's November 2004 order, dealing with the processing and treatment of reclamation claims, I could not find here a knowing and intelligent waiver by the secured creditors even if for some reason I disagreed with that case law. To the contrary, I think the secured creditors here could

reasonably assume that those below them in the pecking order i.e., the unsecured creditors as well as the debtor, acting as a fiduciary for its estate, would responsibly protect the estate and the secured creditors from reclamation sellers obtaining a windfall or prematurely obtaining administrative status. I also don't accept the argument made by Speedline that the foregoing cases that I cited are distinguishable on their facts on the basis that in those cases the reclaiming seller claimed items of inventory or the proceeds thereof as opposed to a specific piece of property. That distinction is not one that is consistent with the logic of those cases, which specifically addressed the issue I discussed without making a distinction among types of collateral. But merely pointing to the respective positions of a reclaiming seller when an asset has been sold and there are excess proceeds. And when it has not yet been sold and the debt that it secures exceeds the

value of the reclamation claim. So, again, in connection with this statutory priority which is out of the ordinary course, given that it's provided to a pre-petition claim only pursuant to 546(c), I can't find any value today that would lead to the allowance today of a specific dollar amount administrative claim. And certainly there would be no requirement under the Court's order for payment of such amount today. This is not to say that the reclamation right has disappeared. In my view, and based on my review of the case law, until the secured

creditor with the prior right under Section 27023 has either been satisfied or it is clear from the liquidation of its collateral that it will not be satisfied, or has released its lien, the reclaiming seller's rights under 546 essentially hang fire. Assuming, of course, it's able to establish its right under all the other hurdles of 546(c). So consequently, I don't accept that the right based on my finding today no longer exists. It is one that is, at this time, of no value. But that at some time in the future, depending on the ultimate disposition of the secured creditor's claim in this case, may have value and may be entitled to an administrative claim. So Mr. Butler you can submit an order with a copy to Speedline's counsel and the committee's counsel consistent with that ruling.

MR. BUTLER: Thank you, Your Honor. That concludes the matters for this morning's omnibus hearing. Just to note, Your Honor, I'd like to state in open court, pursuant to authority that was granted to us by chambers, we did file a notice on Pacer very early this morning and served the 1113/1114 trial counsel and also filed on notice, on Delphidocket.com, that in lieu of the resumption of the

1113/1114 hearing this afternoon there is in this courtroom a meeting confer among trial counsel at 2 p.m. New York time followed by a chamber's conference at 3 o'clock New York time. Both of those conferences are limited to the debtors and the

respondents to the motion. And at least as it stands now, that trial is scheduled to resume at 10 a.m. tomorrow.

THE COURT: Okay. All right. And if we meet and confer, which I'm happy to have in the courtroom, outside of my presence of course, you can also use the conference room if various parties want to break off and talk a moment among themselves. Just let my chambers know if you need that room. We'll open it up for you. So I'll see you at 3.

MR. BUTLER: Thank you, Your Honor.

THE COURT: And that's off the record, right?

MR. BUTLER: Yes.

THE COURT: Fine. Thank you.

(Proceedings concluded at 11:05 a.m.)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Esther Accardi, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

_____ _August 18, 2006____

Signature of Transcriber Date

Esther Accardi_____

typed or printed name